obvious that the petitioner is under no physical restraint. He walked the streets of Washington with no one to hinder his movements, just as he did before the Secretary's order was served on him." Miller, J., added that "there is no very satisfactory definition to be found in the adjudged cases, of the character of restraint or imprisonment suffered by a party applying for the writ of *habeas corpus* which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief ... Obviously the extent and character of the restraint which justifies the writ must vary according to the nature of control which is asserted over the party in whose behalf the writ is prayed".

On a consideration of the authorities we have adumbrated, none of which, except for two, were referred to in the court below or before us, we are of the view that the restraint imposed by reason of an order of restricted residence under the Enactment does not constitute detention of such a nature as to attract the application of the writ of *habeas corpus*. The writ of *habeas corpus* is accordingly not available to the appellant in the circumstances but we would immediately observe consequent to the conclusion we have come to that this denial does not mean that he is without remedy in his quest to challenge the orders made against him or that his right of recourse to the fundamental maxim *'ubi jus ibi remedium'* (there is no wrong without a remedy) is thwarted. On the basis of his claim that his case did not come within the scope, ambit and purview of the Enactment or that an enquiry should have been held before the orders were made, it would be open to him to seek relief by way of an order of *certiorari* or a declaration to this effect. An order of *certiorari* may in appropriate circumstances serve the same purpose as *habeas corpus* [*Rex* v. *Secretary of State for Home Affairs, Ex parte Duke of Chateau Thierry*[16] (at page 930), but for this we would observe that he appears to be out of time unless it is extended under the relevant statutory provisions: *Mersing Omnibus Co. Sdn. Bhd.* v. *Minister of Labour and Manpower & Anor.*[17]], and in *Haley* v. *Commissioner for Corrective Service*[18] it was assumed *sub silentio* that a declaration was available to do the work of *habeas corpus*. In England during the first world war, emergency regulations restricting movement out of or into certain parts of England under the Defence of the Realm Acts, 1914-15 [the precursor to the Emergency Powers (Defence) Act, 1939 enacted during the second world war under which equipollent regulations were promulgated] empowered the making of an order by the competent military authority in prescribed circumstances to prohibit a person from residing in or entering any specified area, and such orders were sought to be assailed, unsuccessfully on the facts and merits of the matter in each case, in *Rex* v. *Denison, Ex parte Nagale*[19] in the Divisional Court of the King's Bench Division by way of writs of prohibition and certiorari, and in *Ronnfeldt* v. *Phillips & Ors.*[20] in the Court of Appeal by way of a declaration that the order was *ultra vires* and void and an injunction to restrain the defendants in that case from preventing him from returning to the area from which he was barred.

We accordingly at the conclusion of argument dismissed this appeal for the reasons we have given.

We would as a footnote suggest for urgent consideration the repeal by Parliament of section 365 and such of its concomitant provisions in Chapter XXXVI of the Criminal Procedure Code as have been rendered redundant as a result of the introduction of Order 54 of the Rules of the High Court, 1980 which provides for applications for *habeas corpus*.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

BOTO' BINTI TAHA v. JAAFAR BIN MUHAMED

[O.C.J. (Salleh Abas C.J. (Malaya)) February 12, 1983]

[Kuala Trengganu – Civil Suit No. 95 of 1981]

Family Law – Malay Customary Law – Claim for share of properties acquired during marriage – Harta sepencarian – Division – Trengganu Administration of Islamic Law Enactment, 1955, s.2.

Malay Customary Law – Harta sepencarian – Division.

In this case the parties were married in 1966. At the time of the marriage the plaintiff-wife worked as a coffee-shop assistant and the defendant-husband carried on a fishmonger business in Dungun. The business of the defendant prospered and during the marriage he bought the matrimonial home, a piece of land, 4 fishing boats, fishing nets and a fish stall. The marriage ended in a divorce in 1974 and on the divorce the defendant only paid the plaintiff her maintenance for the period of *eddah*. The plaintiff applied to High Court for a declaration that she

was entitled as *harta sepencarian* to one-half share in all the properties acquired during her marriage to the defendant and to one-half of all the income derived from the properties since their divorce.

Held: (1) *harta sepencarian* is based on customs practised by the Malays and rests upon the legal recognition of the part played by a divorced spouse in the acquisition of the relevant property and in improvements done to it, in cases where it was acquired by the sole effort of one spouse only. It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property;

(2) once it is proved that a property was acquired during coverture or that the claimant had assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption;

(3) the fact of the plaintiff accompanying the defendant in his business trips and giving up employment because of the marriage must amount to her joint efforts in the acquisition of those properties;

(4) in this case although the plaintiff took no direct part in the defendant's fish business, in fact her constant companionship was responsible for the defendant's peace of mind which enabled him to function effectively as a businessman. It is the fact of the marriage and what the parties did during the marriage that makes these properties *harta sepencarian*;

(5) the properties which are the subject of the present suit are *harta sepencarian* and, except for boat TF 3003, must be divided into one-third for the plaintiff and two, thirds for the defendant. The boat TF 3003 must be divided equally as the boat is already registered in their joint-names;

(6) the share of one-third is awarded to the plaintiff because the evidence shows that she was helping the plaintiff's business indirectly as a partner in his business trips. The income derived from the properties must likewise be divided into one-third and two-third shares.

Cases referred to:

(1) *Laton* v. *Ramah* (1931) 6 F.M.S.L.R. 116.
(2) *Roberts @ Kamarulzaman* v. *Ummi Kalthom* [1966] 1 M.L.J. 163, 165.
(3) *Mohamed* v. *Commissioner of Lands and Mines Trengganu & Anor.* [1968] 1 M.L.J. 227.
(4) *Sepiah binte Suleiman* v. *Abdullah bin Mat Amin* [1977] 2 M.L.J. 90, 91.
(5) *Rasinah* v. *Said*, Taylor Malay Family Law (1937) 15/1 JMBRAS 29.

CIVIL SUIT.

Wan Abdul Mutalib Embong for the plaintiff.

Razali bin Hassan for the defendant.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) : In this case the plaintiff sued her former husband for one-half share in properties acquired during the coverture of their marriage.

The parties were married in Dungun on November 18, 1966 and the marriage was dissolved on June 16, 1974, i.e. about eight years later. At the time of the marriage the plaintiff who was then 24 years old was employed as a coffee-shop assistant in a restaurant in Dungun and earned an income of $80.00 per month, inclusive of food and accommodation. The defendant who was slightly older was carrying on a fish monger business at Dungun market. For their matrimonial home the defendant bought a 432/648 undivided share in a piece of land at Kuala Ibai and built on it a house No. 119 where the parties lived together until they were divorced but the plaintiff still continued to live in it.

After the marriage his business flourished and he expanded his business activities to outstation places, such as Kuala Trengganu, Kelantan, Kuantan, Kuala Lumpur and even Singapore. At the time of the marriage the defendant who had already owned a motor van for the purpose of his business acquired another motor van for the same purpose. On March 6, 1974 he was given by Bandaraya, Kuala Lumpur a stall to sell fish (Stall No. 278) at Fish Dealers' Market, Kuala Lumpur. During the coverture of the marriage the defendant became the registered owner of the following moveable and immoveable properties:

1) 432/648 undivided share in a piece of land comprising KRN 1163 (now MG113) Lot 175 of Mukim Kuala Ibai. This land was acquired on August 2, 1967, i.e. about ten months after the marriage.
2) a house No. 119 built on the above said land which was the matrimonial home;
3) 4 fishing boats registered as TF3003, TF3113, TF3144 and TF8382; boat No. TF3003 being, however, already registered in the parties' joint names;
4) 5 fishing nets; and
5) a fish stall on Lot 107, Lease No. 37, in Fish Dealers' Market at Kuala Lumpur.

There is no dispute and in fact it was conceded by the defendant that these five properties were acquired by him during the coverture of the marriage.

When the marriage ended in a divorce on June 16, 1974, the defendant only gave the plaintiff a cash payment of $228.00 for her expenses for the three months' *eddah* period following the divorce, *i.e.* the period within which a divorced wife cannot

marry another man as the husband can resume the marriage and revoke the divorce. The defendant also objected to the plaintiff continuing to live in their matrimonial home and demanded vacant possession, but she ignored the objections and continued to defy the defendant's demand.

She brought her complaint before the Kathi's court to seek redress; but was advised to file a suit in the High Court. Hence she sued the defendant claiming a declaration that she was entitled as *harta sepencarian* to one-half share in all the properties acquired during her marriage to the defendant and to one-half share of all the income derived from the properties since their divorce.

Harta sepencarian is not so much based on Islamic Jurisprudence as on customs practised by Malays. It is being observed in Indonesia and the properties subject thereto are referred to as Sharikat (*Laton* v. *Ramah*[1]). For the purpose of this judgment it is not necessary for me to do a survey of this principle as practised and observed in Malaysia as this task was admirably done by Raja Azlan Shah, J. (as he then was) in *Roberts @ Kamarulzaman* v. *Ummi Kalthom*[2].

Under section 2 of the Administration of Islamic Law Enactment, 1955 of Trengganu, *harta sepencarian* is defined as:

"the earnings, or the property acquired, as the result of joint labour of two spouses and includes the income derived from capital which is itself the result of joint labour."

Thus jurisprudentially *harta sepencariam* rests upon legal recognition of the part played by a divorced spouse in the acquisition of the relevant property and in improvements done to it (in cases where it was acquired by the sole effort of one spouse only). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property.

In *Mohamed* v. *Commissioner of Lands & Mines, Trengganu & Anor.*[3], a Federal Court decision in a case from Trengganu, Ismail Khan J. (as he then was) in his separate judgment which was concurred by the other two members of the Court made no reference to the definition contained in section 2 of the Enactment, but the principle upon which that case was decided was in no way different from the statutory definition quoted above. His Lordship said:

"The point of importance is whether the land was acquired during coverture and if the second respondent assisted in working it."

Thus once it is proved that a property was so acquired or that the claimant had assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption. (See *Mohamed's* case (*supra*); *Roberts @ Kamarulzaman* v. *Ummi Kalthom* (*supra*), and *Sepiah binte Suleiman* v. *Abdullah bin Mat Amin*[4]).

The question as to whether the properties in this case are *harta sepencarian* must be viewed with reference to the following evidence. There is no dispute that before the marriage the plaintiff was earning $80.00 a month, small though her earning was. Nevertheless, it was her income derived from her efforts and she gave up the employment which produced the income because of her marriage to the defendant. It is also not disputed that in his many trips away from home in connection with his fish business, the defendant was accompanied by the plaintiff, although the financial matters of the business were solely in the hands of the defendant. It is also clear from the evidence of both parties that the properties were acquired from the profits earned by the business. Under the circumstances, an issue arises whether the fact of the plaintiff accompanying the defendant could be regarded as her joint effort or contribution in the production of income with which the properties concerned were acquired. If the answer to this question is in the negative, the properties are not *harta sepencarian*, and if the answer is in the affirmative, the properties are *harta sepencarian* subject to division between the spouses. In my judgment the fact of the plaintiff accompanying the defendant in his business trips and giving up employment because of the marriage must amount to her joint efforts in the acquisition of these properties. Granted that the plaintiff took no direct part in the defendant's fish business, but her constant companionship was responsible for the defendant's peace of mind which enabled him to function effectively as a businessman. In fact he mentioned in his evidence that he took the plaintiff with him in his many business trips because he was otherwise feeling lonely. Thus it is the fact of the marriage and what the parties did during their marriage that makes these properties *harta sepencarian*.

As to the division I wish to refer to *Rasinah* v. *Said*[5], a Perak case cited by E.N. Taylor in

his monograph on Malay Family Law (1937) MBRAS p.29. In that case it was held that a divorced wife was automatically entitled to one-third share of all properties acquired during the marriage and to a half-share if she assisted in the cultivation of the land or the acquisition of the property. Relying on this precedent Professor Ahmad Ibrahim in his celebrated work entitled "Islamic Law in Malaya" published in 1965 by the Malaysian Sociological Research Institute Ltd. at page 229 said this :

"It has been held that generally throughout Malaya, except in Singapore, a divorced wife is entitled to a share of all land acquired during the marriage, *Rasinah* v. *Said*. Where she has in fact assisted to cultivate the land she is entitled to one half of the land, and in other cases to one third of the jointly acquired *property (harta sepencharian)* of the marriage."

I have no doubt as to the correctness of what Professor Ahmad Ibrahim wrote of the law on the subject and I accept it as a guiding principle to determine this case. The fact that the statement only relates to land does not mean that the principle does not apply to moveable properties; like boats and Malay houses. There is no reason for its inapplicability on such properties. In my view it applies to all kinds of properties moveable and immoveable as long as they are acquired during the coverture of the marriage. The principle seems to be confined to land because Malays being rural communities are engaged in traditional occupation of working on the land, their properties until lately were mostly confined to lands and animals kept for the use on the land. These were the form of properties which they could easily comprehend. Today Malays by and large have become urbanised and many are now engaged in business and employed as wage earners. Their sense of value on properties also changes accordingly.

For the reasons given above, I hold that the properties which are the subject of the present suit are *harta sepencarian* and, except for boat TF 3003, must be divided into one-third for the plaintiff and two-thirds for the defendant. The boat TF 3003 must be divided half-half because this boat is already registered into their joint-names. The share of one-third is awarded to the plaintiff because the evidence goes to show that she was helping the plaintiff's business only indirectly as a partner in his business trips. The income derived from the boats, the nets and the fish stall must likewise be divided into one-third and two-third shares. Having determined the share which each party is entitled, I hope that the parties would come to terms on the distribution of these properties and their income and, if they fail to do so, they must come to court again so that an inquiry could be held into the disputed amount.

I therefore enter judgment for the plaintiff in the above terms with costs.

Claim allowed.

Solicitors: *Wan Abdul Muttalib & Co.; Laksamana & Partners.*

DUNLOP MALAYSIA INDUSTRIES BHD. v. PERNAS-SIME DARBY SDN. BHD. & ORS.

[O.C.J. (George J.) October 28, 1983]

[Kuala Lumpur – Civil Suit No. C94 of 1983]

Contract – Joint venture agreement – Transfer of shares – Pre-emptive procedure – Manufacturing licence – Condition restricting freedom of share transfers – Equity holdings of participating companies – Whether transfers increasing holdings of a company infringe condition – Declarations whether ought to be granted to plaintiffs – Companies Act 1965, s. 179.

Sometime before August 17, 1978, the plaintiffs (DMIB), together with the 1st (PSD), 2nd (LTAT), and 3rd (KPDM) defendants and the Kedah State Development Corporation (PKNK) decided to form a company to be known as IT International Sdn. Bhd. (ITISB), the primary object of which was the manufacture of tyres. The plaintiffs applied at the instance of the promoters for a manufacturing licence to the Ministry of Trade and Industry. The Ministry approved the application by letter dated October 20, 1978 with conditions set out in an appendix to the letter, condition (c) of which was material to the decision in this case and which in substance stipulated that at least 79% of the shares of ITISB should be held by Malaysian citizens, including at least 65% to be held by Bumiputras. On October 25, 1978 the Ministry issued the licence. On December 13, 1979 the promoters and Malaysian Rubber Development Corporation Bhd (MARDEC) entered into a joint venture agreement (JVA) by which they agreed to form ITISB in the terms and on conditions set out in the JVA, pursuant to which ITISB was incorporated on December 20, 1979.

JVA restricted the freedom to the transfer of shares, the objective being to ensure that while a member had the right to divest itself of its share in ITISB, the remaining members could ensure that their proportion of equity ownership would not be watered down by such divestment. ITISB's business fell short of projections, and three of the shareholders (the outgoing shareholders) had decided to sell their shares in ITISB. It became obvious that it fell upon the plaintiffs and/or the 6th defendant, Pernas-Sime Darby Holdings Sdn. Bhd. (PSDH) to buy the shares. The outgoing